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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 8

CRANE-JOHNSON COMPANY, A CORPORATION OF NORTH DAKOTA, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 12, 1939.

CERTIORARI GRANTED MARCH 25, 1940.

United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 11,446

TAX REVIEW.

CRANE-JOHNSON COMPANY, PETITIONER,
vs.
COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

ON PETITION TO REVIEW DECISION OF UNITED STATES BOARD OF TAX APPEALS.

FILED MARCH 1, 1939.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1939, of said Court, before the Honorable Archibald K. Gardner, the Honorable John B. Sanborn and the Honorable Joseph W. Woodrough, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the first day of March, A. D. 1939, a record on petition to review the decision of the United States Board of Tax Appeals was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain matter wherein the Crane-Johnson Company was Petitioner and the Commissioner of Internal Revenue was Respondent, which said record as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

[fol. 1] Docket Entries.

Crane Johnson Company, Petitioner,
Docket No. 91809 vs.
Commissioner of Internal Revenue, Respondent.

Appearances:

For Taxpayer: John A. Cull, C. P. A.; John E. Hughes, Esq.

For Comm'r: W. R. Lansford, Esq.

1938

Jan. 3—Petition received and filed. Taxpayer notified. Fee paid. Copy received 1/8/38.

Jan. 3—Copy of petition served on General Counsel.

Mar. 1—Answer filed by General Counsel.

Mar. 1—Request for circuit hearing in St. Paul, Minnesota, filed by General Counsel.

Mar. 11—Notice issued placing proceeding on St. Paul, Minnesota Calendar. Copy of answer and request served.

Apr. 15—Hearing set June 20, 1938, St. Paul, Minnesota.

May 6—Motion for a continuance filed by taxpayer. 5/10/38 Denied.

June 20—Hearing had before Mr. Opper on the merits. Amendment to petition filed. Copy served. Stipulation as to the facts filed. Petitioner's brief due July 20, 1938. Respondent's brief due Aug. 20, 1938. Taxpayer's reply due Sept. 6, 1938.

July 1—Brief filed by taxpayer. 7/2/38 copy served on General Counsel.

Aug. 20—Brief filed by General Counsel.

Sept. 6—Reply brief filed by taxpayer. 9/6/38 copy served on General Counsel.

Dec. 8—Opinion promulgated, Mr. Opper, Division #14. Decision will be entered for the respondent.

Dec. 9—Decision entered, Clarence V. Opper, Div. #14.

1939

Jan. 7—Motion for rehearing and reargument filed by taxpayer.

Jan. 7—Notice of appearance of John E. Hughes as counsel for taxpayer filed.

Jan. 10—Order denying motion for rehearing and reargument, entered.

Jan. 16—Second motion for rehearing filed by taxpayer.

Jan. 23—Order denying second motion for rehearing, entered.

Feb. 6—Petition for review by United States Circuit Court of Appeals, Eighth Circuit, with assignments of error filed by taxpayer.

Feb. 6—Proof of service filed by taxpayer.

Feb. 9—Praecipe for record filed by taxpayer — with proof of service thereon.

[fol. 2] (Petition of Crane-Johnson Company for Appeal.)

(Filed January 3, 1938, U. S. Board of Tax Appeals.)

United States Board of Tax Appeals.

Crane Johnson Company, Petitioner,
Docket Number 91809 vs.
Commissioner of Internal Revenue, Respondent.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice deficiency IT:D:5-TJB-90D dated November 30, 1937 and as a basis of his proceedings alleges as follows:

1. The petitioner is a North Dakota Corporation with principal office at Fargo, North Dakota.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on November 30, 1937.

3. The taxes in controversy are Undistributed Profits Taxes for the calendar year 1936 and for $1,707.36 exclusive of interest.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error: failure to construe Section 26(c) of the Revenue Act of 1936 as applicable to this corporation, and failure to give effect to the fourteenth amendment to the Constituuion of the United States.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

A. The petitioner is under an impairment of capital as evidenced by balance sheets submitted with the return of income for the year in question (copy of which is attached and marked Exhibit B).

B. The statutes of the State of North Dakota forbid the declaration and/or payment of dividends when and where a deficit obtains — Section 4543, Compiled North Dakota Laws of 1913 as amended reads as follows:

"The directors of a corporation must not make dividends except from the surplus profits arising from the business thereof."

C. This petitioner Corporation is entitled to the credit provided in Section 26(c) Revenue Act of 1936 relating to contracts restricting dividends inasmuch as its charter construed with the state law forbidding dividends when there is a deficit, constitutes such a contract.

Section 26(c) of the 1936 Act provides in part,

"In the case of a corporation the following credits shall be allowed to the extent provided in the various sections imposing tax—

(c) Contracts restricting the payment of dividends.

[fol. 3] (1) Prohibition on payment of dividends — an amount equal to the excess of the adjusted net income over

the aggregate of the amount which can be distributed within the taxable year as dividends without violating a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends."

Argument.

Article 26—2 of Regulations 94 provides in part that:

"The charter of a corporation does not constitute a written contract executed by the corporation within the meaning of Section 26(c)."

This provision is not in accord with judicial determinations:—

"The charter of a corporation whether it is created by a special act or formed under a general corporation law, is a contract between the corporation or the incorporators or members and the state", 14 Corpus Juris 162.

Citations.

Dartmouth College vs. Wordward, 3 Wheat 518;

Chicago, etc., Ry. Co. vs. Cutts, 94 N. E. 155;

Miller vs. New York, 15 Wall 478;

Capital City Gas Light Co. vs. Des Moines, 72 Fed. 829.

IT Ruling 3016 Cumulative Bulletin XV 2, page 73 reads,

"A corporation is subject to the surtax imposed by section 14 of the Revenue Act of 1936 on its Undistributed Net Income for 1936, even though the corporation is restricted by State law in declaring and paying dividends while its capital remains impaired."

This ruling is not tenable under the constitution of the United States, Fourteenth Amendment. Taxes must be apportioned by a general rule applied without arbitrary discrimination. To impose a tax on a deficit corporation and excuse from tax one which is in a legal position to pay dividends is discrimination not only arbitrary but discrimination against the weaker corporation and destructive of said weaker corporation.

Wherefore, the petitioner prays that this Board may hear the proceeding and abate the deficiency asserted.

JOHN A. CULL,
Counsel for the Petitioner,
Fargo, North Dakota.

State of North Dakota,
County of Cass—ss.:

A. Hoidston, being duly sworn, says that he is the Secretary of the Crane Johnson Company, a corporation, the petitioner herein, and is duly qualified to verify and that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief and those facts he believes to be true.

A. HOIDSTON.

Subscribed and sworn to before me this 28 day of December, 1937.

L. RYNNING,
Notary Public.

(Notarial Seal)

My Commission Expires Dec. 31, 1941.

[fol. 4] Exhibit A.

IT:D:5
TJB-90D

November 30, 1937.

Crane Johnson Company,
Post Office Box 1540,
Fargo, North Dakota.

Sirs:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1936, discloses a deficiency of $1,707.36, as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1936, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from

the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.
By Chas. T. Russell,
Deputy Commissioner.

Enclosures:
Statement
Form 870
TJB:NB-2

[fol. 5]

Exhibit B

Balance Sheets

Assets	December 31, 1935		December 31, 1936	
Current Assets, etc.				
Cash and Banks	13,428.06		19,523.38	
Notes Receivable	5,141.86		8,490.65	
Accounts Receivable	34,169.64		31,811.98	
Instailment Contract	—		1,100.00	
Merchandise Inventories	74,612.12		90,984.35	
Inventories—Live Stock & Grain	3,828.24		1,332.42	
Expense Inventory—Supplies	487.69	131,667.61	527.96	153,770.74
Investments—Stock				
Stocks	600.00		600.00	
Treasury Stock	4,875.00	5,475.00	4,275.00	4,875.00
Fixed Assets & Property Investments				
Real Estate—Yards		12,464.21		11,383.46
Yard Buildings & Equipment	75,147.00		70,334.32	
Furniture & Equipment—Gen'l Office	4,203.35		4,170.65	
Autos and Trucks	3,384.10		5,228.52	
Farm Lands and Buildings	47,987.22		49,765.86	
Residences, Cafe Bldg. & O. R. E.	13,451.14		7,986.21	
	144,172.81		137,485.56	
Less Depreciation	54,182.59	89,990.22	51,309.44	86,176.12
		239,597.04		256,205.32
Liabilities				
Current Liabilities				
Accounts Payable—Trading	3,144.41		3,996.04	
Accounts Payable—Other	2,150.24		8,602.44	
Interest Accrued Payable	73.55		71.47	
Federal Excise Tax on Employers Payable	—	5,368.20	316.36	12,986.31
Mortgages				
Mortgage Loans		7,105.24		6,961.98
Capital Stock and Surplus				
Capital Stock Issued	250,000.00		250,000.00	
Surplus—Deficit	22,876.40	227,123.60	13,742.97	236,257.03
		239,597.04		256,205.32

[fol. 6] Power of Attorney.

Know All Men By These Presents: That Crane Johnson Company, a corporation organized under the laws of the State of North Dakota, and having its principal office at Fargo, North Dakota, does hereby make, constitute and appoint John A. Cull of Fargo, North Dakota, its true and lawful attorney for it and in its name, to represent it before the Treasury Department of the United States, or any Bureau thereof, or any official or officials of said Department, and also before the United States Board of Tax Appeals, in all matters pertaining to the determination, assessment, collection or payment of any taxes which may be due by it to the United States, or pertaining to claims for refund, abatement or credit based on the assessment or payment of any amounts as such taxes; to inspect any and all of its returns under the Revenue Acts of 1913, 1916, 1917, 1918, 1921, 1924, 1926, 1928, 1932, 1934, the National Recovery Act, and the Revenue Act of 1936, and amendments thereto, respectively; and generally to do, execute and perform every act and thing whatsoever necessary or proper to be done in and about the premises, with full power of substitution.

In Witness Whereof, Said corporation has caused these Presents to be signed in its name, by its Vice President, and attested by its Secretary, and sealed with its corporate seal, this 22nd day of December, A. D. 1937.

CRANE JOHNSON COMPANY,
(Corporate Seal) By W. D. Briggs, Vice-Prest.

Attest:

A. Hoidston.

State of North Dakota,
County of Cass—ss.:

I, L. Rynning, a Notary Public in and for the County and State aforesaid, do hereby certify that W. D. Briggs and A. Hoidston of Crane Johnson Company, and personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered said instrument as their free and

voluntary act and deed, and as the free and voluntary act and deed of said corporation, for the uses and purposes therein set forth, and that they were duly authorized to execute the same and to affix the corporate seal thereto.

Given under my hand and notarial seal, this 28 day of December, A. D. 1937.

(Notarial Seal)

L. RYNNING,
Notary Public, Cass County, N. Dak.

My Commission expires Dec. 31, 1941.

[fol. 7] (Answer of Commissioner of Internal Revenue.)

(Filed March 1, 1938, United States Board of Tax Appeals.)

United States Board of Tax Appeals.

Crane Johnson Company, Petitioner,
Docket No. 91809 vs.
Commissioner of Internal Revenue, Respondent.

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegations contained in Paragraph 1 of the petition.

2. Admits that the notice of deficiency was mailed to the petitioner on November 30, 1937. Denies the remaining allegations contained in Paragraph 2 of the petition.

3. Admits that the tax in controversy is surtax on undistributed profits for the calendar year 1936 in the amount of $1,707.36.

4. Denies that the Commissioner committed error as alleged in Paragraph 4 of the petition.

5(a), (b), (c). Denies the allegations contained in subparagraphs (a), (b), and (c) of Paragraph 5 of the petition.

[fol. 8] 5(d). Denies the remaining allegations contained in Paragraph 5 of the petition under the caption "Argument."

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the determination of the respondent be approved and that the petitioner's appeal be denied.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

Harry R. Horrow,
Special Attorney,
Bureau of Internal Revenue.

[fol. 9] Amendment to Petition.

(Filed at Hearing on June 20, 1938, U. S. Board of Tax Appeals.)

United States Board of Tax Appeals.

Crane Johnson Company, Petitioner,
Docket No. 91809 vs.
Commissioner of Internal Revenue, Respondent.

Whereas in the fourth and final paragraph of the "argument" in the petition of the within petitioner reference is made in error to the Fourteenth Amendment to the Constitution of the United States, motion is hereby made to make substitution for the word "Fourteenth" so that the paragraph in question will read as follows:

This ruling is not tenable under the Constitution of the United States, Article I, Section 2, Clause 3, also under the Fifth Amendment and the Tenth Amendment.

Taxes must be apportioned by a general rule applied without arbitrary discrimination. To impose a tax on a deficit corporation and excuse from tax one which is in a legal position to pay dividends is discrimination against

the weaker corporation and destructive of said weaker corporation.

JOHN A. CULL,
Counsel for the Petitioner.

[fol. 10] Stipulation of Facts.

(Filed at Hearing on June 20, 1938, U. S. Board of Tax Appeals.)

United States Board of Tax Appeals.

Crane Johnson Company, Petitioner,
Docket No. 91809 vs.
Commissioner of Internal Revenue, Respondent.

It is hereby mutually stipulated and agreed by and between the parties to this appeal through their respective counsel that the Board may take the following facts to be true in the determination of the issue in this appeal, subject to the right of either party to introduce further evidence as is not inconsistent herewith:

1. That the petitioner is a corporation organized under the Statutes of the State of North Dakota and incorporated April 29, 1903.

2. That as of January 1, 1936 the petitioner had a deficit of at least $21,251.40. The deficit shown on the books and on the balance sheet accompanying the return of income was $22,876.40. However, an audit of the books for 1935 made by J. A. Cull and Company, a firm of Certified Public Accountants, disclosed a deficit $1,625.00 less in amount. The difference resulting from the auditors correction of value of Treasury Stock.

3. That the records prior to January 1, 1929 are not susceptible to analysis to definitely show whether this deficit occurred from operating losses or capital distributions in excess of earnings or was effected by other adjustments.

4. That no dividend distributions have been made by the petitioner since March 1930 when $9,672.00 was so distributed from surplus balance [existant] at that time.

5. That the petitioner in its Federal Income Return for the calendar year 1936 claimed a credit under Section

26(c) of the Revenue Act of 1936 against the imposition of surtax on undistributed profits under Section 14(a) which the respondent disallowed and which disallowance is the sole issue in this appeal.

6. That the net income for income tax computation for the year 1936 is $13,450.76.

7. That the respondent computed the petitions liability for surtax as shown below:

Net income for surtax computation		13,450.76
Less Normal Tax		1,418.04
Adjusted Net Income		12,032.72
Undistributed Net Income		12,032.72
Less: Specific credit	5,600.00	
10% of 12,032.72	1,203.27	3,796.73
Remainder subject to surtax		8,235.99

[fol. 11]

Computation of Tax	
7% of 1,203.27	84.23
12% of 1,203.27	144.39
17% of 2,406.54	409.11
22% of 2,406.54	529.44
27% of 1,016.37	274.42
7% of 3,796.73 (Specific Credit)	265.77
Total Surtax	1,707.36
Normal Tax	1,418.04
Total Normal Tax and Surtax	3,125.40
Tax assessed, original, Acc't No. 40388	1,418.04
Deficiency	1,707.36

JOHN A. CULL,
Counsel for Petitioner.

J. P. WENCHEL,
Chief Counsel, Bureau
of Internal Revenue.

[fol. 12] (Opinion of United States Board of Tax Appeals.)

United States Board of Tax Appeals.

Crane Johnson Company, Petitioner,
Docket No. 91809. vs.
Commissioner of Internal Revenue, Respondent.

Promulgated December 8, 1938.

1. A corporation prohibited by state law from declaring dividends because of an existing deficit held not entitled to deduction in computation of the undistributed profits surtax under the Revenue Act of 1936.

2. Undistributed profits surtax held constitutional.

John A. Culi, C. P. A., for the petitioner.

W. R. Lansford, Esq., for the respondent.

Opinion.

Opper: This proceeding involves a deficiency in income tax of $1,707.36 for the year 1936. Petitioner is a corporation incorporated in 1903 under the laws of the State of North Dakota. Among other facts, all of which are found, it is stipulated that "as of January 1, 1936 the petitioner had a deficit of at least $21,251.40" and that "the records prior to January 1, 1929 are not susceptible to analysis to definitely show whether this deficit occurred from operating losses or capital distributions in excess of earnings or was affected by other adjustments." Its "net income for income tax computation for the year 1936 is $13,450.76." No distributions to stockholders were made during the taxable year. Petitioner claims to be entitled to a credit in the amount of its entire current income against the surtax on undistributed profits imposed by section 14 of the Revenue Act of 1936, which would free it from that surtax. The credit provision claimed to apply is section 26 (c) (1), respecting contracts restricting the payment of dividends. It allows credit for:

An amount equal to the excess of the adjusted net income over the aggregate of the amounts which can be distributed within the taxable year as dividends without violating a provision of a written contract executed by the

corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends. * * *

Petitioner argues that nothing could be distributed by it because of section 4543 N. D. Compiled Laws of 1913, which prohibits the payment of dividends by corporations except out of surplus. It claims that its charter constitutes in law a contract with the State (Dartmouth College [fol. 13] case, 4 Wheat. 518) which contract includes all statutes of the state applicable to corporations.

Whether or not under other circumstances the corporate charter and statutes of the state could be said to be a written contract "executed by the corporation," any ambiguity in the provision now under consideration is dispelled by reference to its legislative history. As it passed the House of Representatives the Revenue Bill of 1936 contained three distinct relief provisions imposing in lieu of the graduated undistributed profits tax flat rates of tax irrespective of whether dividends were paid. As explained in detail in the Ways and Means Subcommittee and Committee Reports[1] the provisions were designed respectively for the relief of corporations having deficits (section 14), corporations having outstanding contracts not to pay dividends (section 15), and corporations having outstanding indebtedness (section 16). The provision for corporations having deficits[2] would clearly have applied to the petitioner.[3]

---

[1] House Report No. 2475, 74th Cong., 2d sess., p. 8; Subcommittee Report, p. 6.

[2] Sec. 14. Accumulated Earnings And Profits Less Than Adjusted Net Income.

(a) General Rule.—If the accumulated earnings and profits of the corporation as of the close of the taxable year (computed without diminution by reason of the distribution during the taxable year of earnings and profits, or by reason of the taxes imposed by this title for the taxable year) are less than the adjusted net income, the tax imposed by section 13 shall, in lieu of being computed under section 13, be computed by adding:

(1) A tax of 15 per centum of the excess of the adjusted net income over such accumulated earnings and profits; and

(2) A tax upon the remainder of the adjusted net income (less the tax under paragraph (1) computed under section 13 as if the adjusted net income were equal to the amount of such remainder so reduced.

[3] As stated in the report of the Ways and Means Committee (footnote 1, supra) which proposed a 22½ percent rather than a 15 percent tax:

The Senate changed the undistributed profits tax into a flat rate surtax. It simultaneously struck out sections 14, 15, and 16[4] but retained the principle of relief for corporations under contract not to pay dividends (section 15 of the House Bill) by allowing them a credit against the undistributed profits surtax.[5] Sec. 26 (c) (1). A floor [fol. 14] amendment[6] restored the relief for corporations under contract to pay indebtedness, by inserting a similar credit for them. Sec. 26 (c) (2). But no relief provision was restored for deficit corporations generally. By changing the definition of dividends a "dividends paid" credit was allowed to deficit corporations which distribute current earnings,[7] but no credit was allowed for those which do not distribute.[8]

"It has been recognized that in certain cases corporations cannot pay out dividends or that sound policy demands the nonpayment of dividends. Therefore, in certain cases, a flat rate of tax is imposed on corporate incomes, or parts thereof, in lieu of the undistributed profits tax proposed in the general case.

Deficits.—For example, section 14 of the bill provides that corporations with a deficit shall pay a tax of 22½ percent on the amount of earnings necessary to make up this deficit and only come under the new plan in respect to earnings in excess of this deficit, and in excess of the tax paid at the 22½ percent rate. This rule is more accurately stated in the section.

[4] H. R. 12395, Senate Amendments, Nos. 46 and 48, 74th Cong., 2d sess.; Congressional Record, vol. 80, part 8, pp. 8790, 8791, 74th Cong., 2d sess.

[5] Senate Report No. 2156, 74th Cong., 2d sess., p. 12:

"Instead of having a graduated undistributed-profits tax like the House bill with rates ranging as high as 42.5 percent, your committee has adopted a flat rate of 7 percent. By this moderate rate your committee has eliminated most of the complicated relief provisions in the House bill relating to debt and deficit corporations. However, the principle of the House bill affording relief to corporations which are unable to pay dividends because of express prohibitions in contracts entered into prior to March 3, 1936, have been retained for the purpose of the 7-percent undistributed-profits tax."

[6] Congressional Record, vol. 80, part 8, p. 9071, 74th Cong., 2d sess., and see Conference Report, Revenue Bill of 1936, House Report No. 3068, p. 4.

[7] Sec. 115. Distribution By Corporations.

(a) Definition of Dividend.—The term "dividend" when used in this title (except in section 203 (a) (3) and section 207 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

[8] Although a graduated rate was later substituted for the flat surtax proposed by the Senate (Revenue Act of 1936, sec. 14), the credit provisions remained unchanged.

It does not appear that this omission was unintentional. On the contrary the Finance Committee's explanation[9] of the change in the dividend definition indicates that the reason for the omission may have been the difficulty of determining the existence of accumulated earnings and profits; that is, whether or not there is a true deficit. Precisely that difficulty is illustrated by the present case. Although it is stipulated that a deficit exists, the facts also show that the stipulated deficit reflects only the present book condition and that it can not be shown whether this represents an actual deficit or merely book adjustments prior to 1929, which may or may not have been artificial or improper. The underlying plan of this surtax is to allow credit only for actual distributions. The petitioner, having failed to bring itself clearly within any of the exceptions to that plan, must be governed by the general principle. New Colonial Ice Co. vs. Helvering, 292 U. S. 435.

Petitioner contends further that at least if construed to apply to the present circumstances the undistributed profits surtax is beyond the constitutional power of Congress. We are thus unavoidably required to give a limited consideration to its validity. Rita O'Shaughnessy, Executrix, 21 B. T. A. 1046.

Constitutionality of the measure is attacked on three grounds. First, petitioner claims that it is not a tax on [fol. 15] incomes within the Sixteenth Amendment and therefore is unconstitutional because not apportioned among the states according to population as required by Article I, section 2, of the Constitution. What was said by the Supreme Court in Helvering vs. National Grocery Co., 304 U. S. 282, we believe to be equally applicable here and to be conclusive of the question:

---

[9] Sec. 115 (a). Dividends Out Of Current Earnings.

In order to enable corporations without regard to deficits existing at the beginning of the taxable year to obtain the benefit of the dividends paid credit for the purposes of the undistributed profits surtax, section 115 (a) changes the definition of a dividend so as to include distributions out of the earnings or profits of the current taxable year. The amendment simplifies the determination by providing that distributions during the year, not exceeding in amount the current earnings, are dividends, constituting taxable income to the shareholder and a dividends paid credit to the corporation. As respects such dividends the complicated determination of accumulated earnings or profits is rendered unnecessary. [Emphasis added.] Senate Report No. 2156, 74th Cong., 2d sess., p. 18.

It is said that the statute is unconstitutional because the liability imposed is not a tax upon income, but a penalty designed to force corporations to distribute earnings in order to create a basis for taxation against the stockholders. If the business had been carried on by Kohl individually all the year's profits would have been taxable to him. If, having a partner, the business had been carried on as a partnership, all the year's profits would have been taxable to the partners individually, although these had been retained by the partnership undistributed. See Heiner vs. Mellon, Nos. 144 and 145, decided May 16, 1938. Kohl, the sole owner of the business, could not by conducting it as a corporaton, prevent Congress, if it chose to do so, from laying on him, individually the tax on the year's profits. If it preferred, Congress could lay the tax upon the corporation, as was done by section 104.

Second, petitioner claims that this surtax violates the Tenth Amendment in that "it attempts to regulate the internal affairs of the state in its relation to its corporations by imposing a surtax for failure to distribute", thus disturbing "the whole economic policy of the corporation", "by attempting to state what are dividends and what would be a return of capital contrary to the laws of the state of incorporation", and by offering an inducement for the declaration of dividends in violation of state law which would subject the directors and the corporation to penalties. A similar argument was also advanced and rejected in Helvering vs. National Grocery Co., supra. The statute before us is not invalid "because it interferes with the power to declare or to withhold dividends—a power which the State conferred upon the corporation. The statute in no way limits the powers of the corporation", as Mr. Justice Brandies said in that case. Any corporation not distributing its profits prevents the imposition of the individual surtax thereon. An obstruction to the Federal taxation is thus created. " 'Congress in raising revenue has incidental power to defeat obstructions to that incidence of taxes which it chooses to impose.' United Business Corporation vs. Commissioner, 62 F. (2d) 754, 756." Helvering vs. National Grocery Co., supra.

Third, petitioner alleges that our interpretation of section 26 (c) makes this surtax violative of the due process

requirement of the Fifth Amendment. The crux of this contention as stated in petitioner's reply brief is that:

It discriminates unfairly between corporations of the same class by allowing a dividend paid credit under Section 26 (c) to corporations having written contracts of a particular type, but not allowing a similar credit to other corporations with the same legal obligations differently evi- [fol. 16] denced. It discriminates unfairly against the weaker corporation not permitted under state law to pay dividends and in favor of the stronger corporation in a position to legally pay dividends and thus escape tax liability.[10]

Congress undeniably has the power to levy a tax, graduated or otherwise, on the current income of all corporations, including those having deficits. Foley Securities Corporation, 38 B. T. A. 1036; Long Beach Improvement Co., 5 B. T. A. 590; see Willcuts vs. Milton Dairy Co., 275 U. S. 215, 219; Brushaber vs. Union Pacific Railroad Co., 240 U. S. 1. Petitioner has not been singled out for special taxation. It comes within the general ambit of the tax. Rather it is in reality complaining of the failure to include it in specific exceptions granted to corporations situated in some respects like itself but in other respects differently. Thus it is doubtful whether the petitioner is in a position to raise the constitutional question since the burden of a tax deduction allowed to others falls in too re-

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[10] These arguments as set out more fully in petitioner's main brief are:

"a—It is unreasonable, arbitrary and capricious, at least as to deficit corporations in that it encourages and rewards violation of state law, exacts a penalty for restoring impaired capital, does not conform to established income tax principle of taxing according to ability to pay, exacts a penalty for adherence to soundly established and regularly accepted accounting principles and is an excessive super tax approaching confiscation.

b—It discriminates unfairly between corporations in the same class, by favoring the strong over the weak, by specifically relieving insolvent corporations and other corporations of certain types and failing to relieve the weak but struggling corporations, by allowing a dividend paid credit to corporations which give up and liquidate within the year but providing none for deficit corporations attempting to carry on, by allowing credits under Section 26 (c) to corporations having written contracts of a particular type but not allowing similar credits to other corporations with the same legal obligations differently evidenced, by allowing greater credits under Section 26 (c) to corporations having one large contract than to corporations with the same total obligation made up of several smaller contracts and by failing to provide any dividend credit to corporations suffering a capital loss during the year without having prior earnings at the beginning of the year.

mote and indefinite a way upon the remaining taxpayers. See Frothingham vs. Mellon, 262 U. S. 447, 486. But, in any event, deductions of this type are a matter of legislative grace within the sound discretion of Congress. New Colonial Ice Co. vs. Helvering, supra; Davis vs. United States, 87 Fed. (2d) 323. Petitioner can not complain if this grace did not extend to cover it.

The due process limitations on the taxing power are that the means be "appropriate to the end", Helvering vs. City Bank Farmers Trust Co., 296 U. S. 85; and that the end be taxation rather than confiscation, Brushaber vs. Union Pacific Railroad Co., supra. See also Stella S. Housman, 38 B. T. A. 1007. The objective of the present statute, like the personal holding corporation provisions involved in Foley Securities Corporation, supra, is to subject the income of the corporations concerned "to surtax either in the hands of the stockholders or in the hands of the corporations themselves."[11] In this case, as in the Foley case, that end is accomplished by means which we can not say [fol. 17] are inappropriate. Since the income is not taxable to the stockholders it is taxed to the corporation.

The fact that in certain instances corporations unable for other reasons to distribute their income are expressly exempted or are allowed deductions having a similar effect, does not make the tax confiscatory as to the petitioner. Congress in those instances sacrificed its general objective to make what it considered desirable exceptions. There are many other conceivable situations where distribution of income is difficult or impossible, for which Congress did not think it necessary to provide. Whenever deductions or exemptions are allowed there are necessarily taxpayers in closely related situations who remain subject to the general rule. "The difficulty of adjusting any system of taxation so as to render it precisely equal in its bearing is proverbial and such nicety is not even required of the states under the equal protection clause, much less of Congress under the more general requirement of the due process of law in taxation." La Belle Iron Works vs. United States, 256 U. S. 377. The question is whether the concept under-

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[11] See Ways and Means Committee Report, House Report No. 2475, 74th Cong., 2d sess., p. 4.

lying the statutory treatment "is one that an enlightened legislator might act upon without affront to justice." Burnet vs. Wells, 289 U. S. 670.

The failure of Congress to except deficit corporations generally from the underlying concept of the undistributed profits surtax may be justified on several grounds. Among these are the ease with which a deficit can be created by mere bookkeeping changes;[12] the administrative difficulties of investigating the actual as distinguished from the apparent condition and value of the corporate assets, and the extent of the liabilities, both subject to constant fluctuations;[13] and, particularly pertinent in this case, the fact that the deficit may not be an operating item, as shown by the stipulation of facts, but may have arisen from the management's own improper action in making distributions out of capital. With these possible bases for its action in mind, we can not conclude that Congress acted unreasonably in withholding from deficit corporations the deductions it allowed to certain others, if indeed our determination of that question is required. Certainly there is no discrimination greater than those complained of in the Brushaber case, supra, and none which may reasonably be said to amount to confiscation.

Reviewed by the Board.

Decision will be entered for the respondent.

Seal
U. S. Board of
Tax Appeals
1924

[fol. 18] (Order of Redetermination, December 9, 1938.)

United States Board of Tax Appeals

Washington

Crane Johnson Company, Petitioner,
Docket No. 91809. vs.
Commissioner of Internal Revenue, Respondent.

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[12] See La Belle Iron Works vs. United States, supra, p. 390.
[13] See footnote 9, supra.

Decision.

Pursuant to the determination of the Board, as set forth in its report promulgated December 8, 1938, it is

Ordered and Decided: That there is a deficiency in income tax for the year 1936 in the amount of $1,707.36.

Enter:

Entered Dec. 9, 1938.

(Seal of U. S. Board of Tax Appeals.)

CLARENCE V. OPPER,
Member.

[fol. 19] (Motion of Crane-Johnson Company for Rehearing and Reargument.)

(Filed January 7, 1939, U. S. Board of Tax Appeals.)

On December 8, 1938, this Honorable Board promulgated its opinion in the above entitled case and on December 9, 1938, it entered an order redetermining the deficiency.

The undersigned enters appearance for the taxpayer and in its behalf moves for a rehearing and reargument of this case on three grounds:

(1) The questions presented to this Honorable Board were two, viz.: (a) a question of statutory construction, and (b) a question of constitutional law. They were questions of law only. Until now the taxpayer has not been represented by an attorney at law and the respondent was represented by an attorney at law throughout this proceed-
[fol. 20] ing. In dealing with the pure questions of law involved in this case the Board did not have the assistance of counsel for the taxpayer (compare Johnson vs. Zerbst, 304 U. S. 458, 463) and certain points which it is believed would have necessitated a decision in favor of the taxpayer were not called to the attention of the Board.

The issue presented in this case is one of great importance and of vital consequence to numerous taxpayers located in all parts of this country. It is believed that the Board will welcome the opportunity to thoroughly consider the points of law pointing to a correct solution of the issue and to have the benefit of exhaustive legal argument

for both sides. Of course such exhaustive legal argument cannot be presented in a short petition for rehearing but if rehearing is granted such argument will be presented, Amicus Curiae briefs will be filed and the Board will be in a much better position to decide the issue. In view of the importance of the issue and its novelty no harm can be done by granting this motion and allowing this reargument. A pure and novel question of law and one of first impression, the decision of which will constitute an important precedent and affect many taxpayers should not be decided without full legal argument.

(2) The second ground for rehearing is that the Board has overlooked applicable principles of law. The decision of the Board is based entirely upon legislative history but it is settled that no resort may be had to legislative history unless a statute is ambiguous. Helvering vs. City Bank Farmers Trust Co., 296 U. S. 85, at page 89. The Board in its opinion does not say that the phrase, "a provision of a written contract executed by the corporation prior to May 1, 1936" is ambiguous. Unless it is no resort may be had to legislative history. It is established [fol. 21] by decisions of the United States Supreme Court and it is now Hornbook law that the charter of a corporation unquestionably constitutes "a written contract executed by the corporation." This being so, this charter is literally within the provisions of the above-quoted law. It binds the corporation not to declare dividends as fully as any other written contract might do.

(3) Even based upon legislative history, the decision of the Board is wrong because it is predicated entirely on the baseless assumption that the mere fact that the Senate strikes a provision out of the House Bill shows Congress did not intend some cases which would be included within the stricken provision to be embraced within any other provision of the law. Such an assumption is wholly untenable for non constat the provision was stricken because the Senate considered it too broad and did not intend to grant relief to all deficit corporations, as the stricken provision provided, but only to those restricted by charter from paying dividends.

(4) The Board will surely agree that taxpayers of the country who have thousands of dollars depending upon a

solution of this issue are entitled to a clear and unequivocal declaration on the question whether the charter constitutes a written contract executed by the corporation and if it does, by what authority ambiguous legislative history may be used to except from the plain words of the law "a provision of a written contract executed by the corporation prior to May 1, 1936."

The Question of Statutory Construction.

The statute to be construed is quoted in the opinion of the Board and reads as follows:

"An amount equal to the excess of the adjusted net income over the aggregate of the amounts which can be distributed within the taxable year as dividends without vio- [fol. 22] lating a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends. * * * "

The particular words to be construed are "without violating a provision of a written contract executed by corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends."

Nothing is better settled than that no resort may be had to legislative history unless a statute is ambiguous. Helvering vs. City Bank Farmers Trust Co., 296 U. S. 85, at page 89. In that case the Committee Report clearly and expressly supported the contention of the taxpayer. The Supreme Court admitted this but said it could not look at the Committee Report or legislative history because the words of the law were plain. See also voluminous Supreme Court cases collected and quoted in Minnesota Tea Co. vs. Commissioner, 76 Fed. (2d) 797, 799.

Is the Board prepared to say the words "a written contract executed by the corporation prior to May 1, 1936" are ambiguous? It does not say so in its opinion. If these words are ambiguous then about everything is ambiguous. Unless the Board can say that they are ambiguous it has no right to resort to legislative history. Hence the taxpayer is entitled to a decision on the question of whether they are ambiguous or not.

Whether they are or are not ambiguous it is Hornbook law that the charter of a corporation constitutes a written

contract executed by the corporation. 14 Corpus Juris, p. 161, Sec. 162. See citations collected in the Supplement to Volume 3 of Paul & Mertens, pages 350-358, Sec. 32 (a) [fol. 23] 43, where the matter is exhaustively discussed. See also Fletcher's Encyclopedia on Corporations, Vol. 7, Sec. 4291, p. 7572, also Sec. 4290. Also, Corporations, R. C. L., Sec. 71, page 93.

In a trial in the District Court a litigant is entitled to present propositions of law to the District Judge and ask the District Judge to rule on such propositions of law. By all rules of fair play, this taxpayer is entitled to a ruling from this Honorable Board on the question whether the charter of a corporation constitutes "a written contract executed by the corporation." This question is not met but is evaded by the opinion rendered herein although it goes to the heart and crux of the case. If the charter does constitute a written contract the Board should say so. Whether the Board thinks Congress excepted such contracts from the benefit of the law is a question to be determined solely from the words of the law above quoted.

Rules of Construction Overlooked in the Opinion.

On the question of statutory construction, the opinion rendered in the case at bar overlooks two well-recognized rules of statutory construction. They are irreconcilable with the opinion.

The Board in its opinion refers to the provision being construed as "a relief provision." Such it manifestly is. The rule for the construction of a relief provision is that its construction must be liberal. In Standifer Construction Corporation, 4 B. T. A. 525, the Board said, at p. 561:

"Relief legislation should be liberally construed in accordance with the well-accepted rule of statutory construction with respect to such legislation."

[fol. 24] See also Johnston, 33 B. T. A. 551, 553; Bonwit, Teller & Co. vs. U. S., 283 U. S. 258, 263.

Furthermore, the Board has also overlooked the applicable rule of statutory construction that doubts, if any, must be resolved in favor of a taxpayer. Hassett vs. Welch, 303 U. S. 303, 314.

Even the Legislative History Does Not Support the Conclusion Reached.

The opinion jumps to the conclusion that because the Senate struck out a provision of the House Bill which would give relief to all deficit corporations it did not intend to give relief to only such deficit corporations as were prohibited from declaring dividends by state law. This does not follow. Non constat the Senate struck out the provision because it considered it too broad as to others and superfluous as to corporations forbidden by law to declare dividends. Surely Members of the Senate must be taken to have been familiar with the Hornbook law that the charter of a corporation constituted a written contract, 7 R. C. L., Sec. 71, page 93. Repetition is inconsistent with a well drawn law.

The Conference Committee once struck a provision out of a Senate Bill which provided that if a taxpayer had filed a claim for credit, a payment made after the Statute of Limitations should not constitute an overpayment. For the history of this provision and for the view that because the Conference Committee struck it out it did not intend it to become law, see the dissenting opinion of Judge Littleton in Naumkeag Steam Cotton Co. vs. U. S., 2 F. Supp. 126, 140 at p. 152.

[fol. 25] The majority of the Court of Claims held otherwise in that case and so did the Supreme Court in Stearns Co. vs. U. S., 291 U. S. 54.

The opinion indulges in speculation that the provision was stricken out because of the difficulty of determining a deficit. This is pure speculation because the reason the provision was stricken does not appear. It is also speculation irreconcilable with the rule that doubts must be resolved in favor of a taxpayer to which more than mere lip service must be given. The difficulty of determining whether a deficit exists is no more difficult than any other valuation question, such as the value of corporate stock, the value of corporate assets for depreciation purposes or for invested capital purposes. If a corporation contracted with X that it would not declare a dividend if a deficit existed the Board would have to decide whether a deficit did exist.

The provision stricken out of the law was so broad that it would give relief to all corporations with deficits regardless of whether the law of the state in which they were incorporated prohibited them paying dividends. There was no reason why corporations which could legally declare dividends should be granted relief if they did not do so. This alone justified the striking of the provision out of the House Bill which granted relief to all corporations with deficits. There was every reason why corporations forbidden to declare dividends should be relieved and we contend they were relieved by an express provision contained in the law and the construction of which is in issue in this case. No reason appears why a distinction should be made between charter contracts and other contracts.

[fol. 26] The legislative history of the law supports the conclusion that Congress intended to give corporations an option to distribute their earnings and not be subject to the tax or not to distribute and become subject to the tax. The provision in the law about contract prohibitions shows this. This taxpayer had no option because its contract with the State forbade the distribution of dividends.

Decision Contrary to Consensus of Impartial Opinion.

The decision in the case at bar is contrary to the views of independent and learned writers on the subject. See Paul & Mertens Supplement to Vol. 3, at pages 350-358, which contains numerous citations of law review articles and other pertinent authorities. See also Montgomery on Income Tax Procedure for 1937, pages 726, 727. See also C. C. H. 1936, paragraph 5279.

Conclusion.

In conclusion it is respectfully submitted that this taxpayer is entitled to a declaration of law from this Honorable Board and express ruling on the following points:

(1) Whether charter of a corporation is "a written contract executed by the corporation." If so, why can it be excepted from the plain words of the law? The opinion rendered herein seems to be based on assuming, without conceding, the charter does constitute "a written contract executed by the corporation," but uses ambiguous legislative history to read an exception into the statute.

[fol. 27] (2) Whether the words of the statute "a written contract executed by the corporation" are ambiguous.

(3) If they are ambiguous whether merely because the Senate strikes a much broader provision out of a House Bill and the legislative history fails to disclose the reason it was stricken it conclusively follows that Congress did not intend any case included within the stricken provision to become law although the law as enacted contains another and narrower provision which includes some but not all cases embraced by the stricken provision.

(4) Whether relief legislation is to be construed liberally and whether all doubts in its construction including doubts in its legislative history are to be resolved in the taxpayer's favor.

In the opinion rendered the Board does not clearly and unequivocally declare itself on any of these points except point (3). They are all vital to a decision of the issue here and taxpayers from which it is sought to take hundreds of thousands of dollars are by the standards of fairness inherent in Judicial decision entitled to a declaration on each of them before their money may be taken.

All of which is respectfully submitted.

JOHN E. HUGHES,
Counsel for Petitioner.

[fol. 28] Appendix.

"The directors of a corporation must not make dividends except from the surplus profits arising from the business thereof." Sec. 4543 North Dakota Compiled Laws of 1913.

In 14 Corpus Juris, p. 161, Sec. 162, the rule of law applicable here is thus stated:

"The charter of a corporation, whether it is created by a special act or formed under a general corporation law, is a contract between the corporation, or the corporators or members, and the state. It is a contract beween the state and the corporation, between the corporation and the stockholders, and between the stockholders and the state."

In Vol. I, Fletcher Cyclopedia Corporations at p. 440, Sec. 226, the law is thus stated:

"In other words, the provisions of the statute or general incorporation act enter into and form a part of the charter, and the incorporation papers and statute are to be construed together, the latter controlling in case of a conflict.

"It is not necessary that the general law should be copied in the charter, but it forms an essential part of it, and all parties are bound by its terms, whether copied in the charter or found only on the statute book."

See also Vol. 2, Chap. 20, Sec. 765, p. 1736.

[fol. 29] We concede that Congress did not intend to grant relief to deficit corporations generally (deficit corporations in a State where the law allowed the payment of dividends), but that has nothing to do with the question at issue here. It was necessary to change the definition of dividends to enable corporations in a State the law of which did not prevent a distribution of earnings, to come clearly within this credit. The statement in the Committee Report about the complicated determination of "accumulated earnings" had in mind the experience of the profits tax laws involving the tentative tax computation. See Article 857, Reg. 62. Ayers & Co., 1 B. T. A. 1135. It did not have in mind corporations with deficits existing long prior to the taxable year.

Motion for a Declaration of Law.

Comes now the taxpayer by its counsel and moves that this Honorable Board specifically declare or refuse to declare each of the following propositions of law, material to a decision of this case by marking the same "held" or "refused".

(1) The charter of the corporation is a written contract between the corporation and the state. (Corporations, 7 Ruling Case Law, Sec. 71, page 93; 14 C. J., Sec. 162; Cook on Corporations, 8th Edition, Secs. 492-494.)

(2) The provisions of the general corporation law of North Dakota are a part of said charter.

(3) Section 4543 N. D. Compiled Laws of 1913 prohibits the payment of dividends by corporations except out of surplus. No dividend could be declared without vio-
[fol. 30] lating this provision of the contract between the corporation and the state.

(4) The following words of Section 26 (c) (1) of the Revenue Act of 1926, "without violating a provision of a written contract executed by the corporation prior to May 1, 1936, which expressly deals with the payment of dividends,"—are not ambiguous.

(5) Unless words of a statute are ambiguous no resort may be had in its construction to legislative history.

(6) All doubts in the construction of a statute are to be resolved in a taxpayer's favor and relief legislation is to be liberally construed in favor of taxpayers.

(7) Even in cases where resort may be had to legislative history, in a case where a statute as originally presented contains two provisions one of which is much broader and embraces more classes than the other and the Legislature strikes out the broader provision but allows the other provision to remain in the law, the cases falling within the remaining provision cannot be read out of it because the broader provision was stricken by the Legislature.

JOHN E. HUGHES,
Attorney for Taxpayer.

[fol. 31] (Order denying Motion for Rehearing.)

United States Board of Tax Appeals.

Crane Johnson Company, Petitioner,
Docket No. 91809. vs.
Commissioner of Internal Revenue, Respondent.

The opinion herein having been promulgated December 8, 1938, and decision thereon having been entered December 9, 1938, and petitioner having on January 7, 1939, by its counsel, John E. Hughes, Esq., filed a "Motion For Rehearing And Reargument" herein, upon due consideration thereof it is

Ordered: That the said motion be and the same hereby is denied.

CLARENCE V. OPPER,
Member.

Dated: January 10, 1939.
Washington, D. C.

Seal
U. S. Board of
Tax Appeals
1924

[fol. 32] (Second Motion of Crane-Johnson Company for Rehearing.)

(Filed January 16, 1939, United States Board of Tax Appeals.)

Comes now the petitioner by its counsel and moves for a rehearing on the ground that the denial of its first motion for rehearing is a denial of the requirements of due process of law.

In this case there were no facts in dispute. They were stipulated. The only question involved was a question of law. The respondent was represented by able and experienced counsel. The petitioner was not represented by an attorney at law. After the entry of the decision herein the petitioner, by an attorney at law, moved for a rehearing and reargument and one of the grounds of the motion was that it had not been heretofore heard on this question of law, through an attorney at law.

Petitioner relies upon the following decisions of the Supreme Court of the United States:

[fol. 33] In Railroad Commission vs. Pacific Gas & Electric Co., 302 U. S. 388, the court said at page 393:

"The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. Ohio Bell Tel. Co. vs. Public Utilities Commission, 301 U. S. 292, 304."

The Sixth Amendment to the Constitution provides that a defendant may not be deprived of liberty unless he is

represented by counsel. We think it is implicit in Johnson vs. Zerbst, 304 U. S. 458, that this requirement of fair play would have been embraced within the Fifth Amendment in any event and that one may not be deprived of property as well as liberty without being heard by an attorney at law. In Johnson vs. Zerbst, 304 U. S. 458, the court said at page 462 and page 463 that the Sixth Amendment,

"embodies a realistic recognition of the obvious truth that the average defendant does not have the professional skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel: That which is simple, orderly and necessary to the lawyer—to the untrained layman—may appear intricate, complex and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter,* this Court has pointed to 'the humane policy of the modern criminal law' which now provides that a defendant 'if he be poor may have counsel furnished him by the state.'"

Again the Supreme Court said:

[fol. 34] "The right to be heard would be, in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."

In view of the foregoing expressions, the denial of the motion for a rehearing amounted to a denial of the right to be represented by counsel and is a denial of due process of law.

In Ohio Bell Tel. Co. vs. Public Utilities Commission, 301 U. S. 292, the court said at page 304 that the right to a fair hearing "is one of the rudiments of fair play."

Again the court said at page 305:

"There can be no compromise on the footing of convenience or expediency or because of natural desire to be rid of harassing delay, when the minimal requirement has been neglected and ignored."

*Underlining ours for emphasis.

By admitting Certified Public Accountants to practice before it the Board has represented that they are competent to do so and the taxpayer did not waive the right to counsel because it relied upon the Board's representation.

A further ground of this motion for rehearing is "the one who decides must hear." (Morgan vs. United States, 298 U. S. 468, 481) and the other members of the [division] deciding this case did not hear the case. Mr. Opper alone heard it.

All of which is respectfully submitted.

JOHN E. HUGHES,
Attorney for Petitioner.

[fol. 35] (Order denying Second Motion for Rehearing.)

Under date of December 8, 1938, there was promulgated the Board's opinion in the above entitled proceeding and based thereon there was entered on December 9, 1938 the Board's decision. Under date of January 7, 1939, counsel for the petitioner filed a motion for rehearing and reargument, which motion was denied on January 10, 1939. There has now been filed with the Board under date of January 16, 1939, a "Second Motion for Rehearing" by counsel for the petitioner. Careful consideration has been given to petitioner's motion and it is believed that it should be denied. It is therefore

Ordered: That the said motion be and the same hereby is Denied.

C. R. ARUNDELL,
Member.

Dated: January 23, 1939.

Seal
U. S. Board of
Tax Appeals
1924

[fol. 36] (Petition of Crane-Johnson Company for Review of Decision of United States Board of Tax Appeals.)

(Filed February 6, 1939, United States Board of Tax Appeals.)

United States Board of Tax Appeals

Washington

Crane-Johnson Company, Petitioner,
Docket No. 91,809 vs.
Commissioner of Internal Revenue, Respondent.

Comes now the above-named petitioner by its counsel, and hereby petitions that the decision of the Board in the above-entitled case be reviewed by the Circuit Court of Appeals for the Eighth Circuit according to law.

The decision of the Board herein was entered December 9, 1938. Petitioner's second motion for rehearing was denied January 23, 1939.

Nature of Controversy.

(1) This case involves undistributed profits and surtax for the calendar year 1936. It was stipulated that "on January 1, 1936 the petitioner had a deficit of at least $21,251.40." It was stipulated that petitioner's net income for 1936 was $13,450.76. This is less than petitioner's deficit. The question in this case is whether petitioner is entitled to a credit in the amount of the foregoing net in- [fol. 37] come for 1936 against the surtax on undistributed profits imposed by Section 14 of the Revenue Act of 1936. The credit provision is 26 (c) (1) of the Revenue Act of 1936, which reads as follows:

"An amount equal to the excess of the adjusted net income over the aggregate of the amounts which can be distributed within the taxable year as dividends without violating a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends."

Petitioner was forbidden by Section 4543 North Dakota Compiled Laws of 1913 to declare any dividend for 1936. It contends that the said law enters into and is a part of its Charter and that its Charter is "a written contract

executed by it prior to May 1, 1936, which expressly deals with the payment of dividends." Petitioner was incorporated in 1930 under the Laws of the State of North Dakota.

The question for this court to decide is whether the said Charter constitutes "a written contract executed by the corporation prior to May 1, 1936." If it does, the deficiency of $1707.36 which the Board held petitioner was liable for for the taxable year 1936, is eliminated.

Assignments of Error.

(1) The Board erred in failing to enter an order that petitioner was not liable for the deficiency claimed by respondent.

(2) The Board erred in sustaining the determination of the respondent.

[fol. 38] (3) The Board erred in failing to hold that the statutory law of North Dakota was a part of petitioner's Charter, and that petitioner's Charter constituted a written contract executed by it prior to May 1, 1936, which contract contained a provision expressly dealing with the payment of dividends and that no dividends could be distributed without violating this law and hence petitioner was entitled to the credit allowed in 26 (c) (1) of the Revenue Act of 1936.

(4) The Board erred in failing to hold that Section 26 (c) (1) of the Revenue Act of 1936 was not ambiguous and hence no resort could be had to legislative history.

(5) The Board erred in resorting to legislative history without passing on the question whether such provision was ambiguous.

(6) The Board erred in improperly misconstruing and misapplying the legislative history of the provision in question in failing to hold that the legislative proceedings were not inconsistent with an intention to allow the credit claimed in the case at bar.

(7) The Board erred in failing to consider and apply the rules of statutory construction that all doubts in a taxing statute are to be resolved in favor of a taxpayer

and that a relief provision is to be construed liberally in a taxpayer's favor.

[fol. 39] (8) The Board erred in raising of its own motion an issue not raised by the parties.

(9) The Board erred in denying petitioner's two motions for re-hearing and in depriving it of the right to be heard by counsel.

Wherefore, petitioner prays that the decision of the Board may be reversed.

JOHN E. HUGHES,
First National Bank Bldg.,
Chicago, Illinois,
Attorney for Petitioner.

State of Illinois,
County of Cook—ss.:

John E. Hughes being duly sworn, says that he is the attorney for the petitioner above-named and he has read the foregoing petition for review and that he verily believes the Board erred in point of law as therein stated.

JOHN E. HUGHES.

Subscribed and Sworn to before me this 4th day of February, A. D. 1939.

(Seal)

FRANCES V. SCHULTZ,
Notary Public.

[fol. 40] Praecipe for Transcript of Record.

(Filed February 9, 1939, United States Board of Tax Appeals.)

To the Clerk of the United States Board of Tax Appeals:

Sir:

Please prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, the following in the above-entitled case:

(1) The Docket entries.

(2) All pleadings before the Board.

(3) The Stipulation of the parties.

(4) The opinion and decision of the Board.

(5) The two Motions for rehearing filed by petitioner and orders denying same.

(6) Petition For Review.

JOHN E. HUGHES.

Received a copy of the above and foregoing Praecipe this 9th day of February, A. D. 1939.

J. P. WENCHEL,
Chief Counsel, Bureau
of Internal Revenue.

[fol. 41] (Clerk's Certificate to Transcript.)

United States Board of Tax Appeals

Washington

Crane-Johnson Company, Petitioner,
Docket No. 91809. vs.
Commissioner of Internal Revenue, Respondent.

Certificate.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do herby certify that the foregoing pages, 1 to 40, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

Seal
U. S. Board of
Tax Appeals
1924

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 20th day of February, 1939.

B. D. GAMBLE,
Clerk, United States Board
of Tax Appeals.

Filed Mar. 1, 1939. E. E. Koch, Clerk.

[fol. 38] And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz.:

(Appearance of Counsel for Petitioner.)

United States Circuit Court of Appeals,
Eighth Circuit.

Crane-Johnson Company, Petitioner,
No. 11,446. vs.
Commissioner of Internal Revenue.

The Clerk will enter my appearance as Counsel for the Petitioner.

JOHN E. HUGHES,
38 South Dearborn Street
Chicago, Illinois.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 3, 1939.

(Appearance of Mr. J. P. Wenchel and Mr. John M. Morawski as Counsel for Respondent.)

The Clerk will enter my appearance as Counsel for the Respondent.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

JOHN M. MORAWSKI,
Special Attorney, Bureau of Internal Revenue.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 9, 1939.

[fol. 39] (Appearance of Mr. James W. Morris and Mr. Sewall Key as Counsel for Respondent.)

The Clerk will enter my appearance as Counsel for the Respondent.

JAS. W. MORRIS,
Assistant Attorney General.

SEWALL KEY,
Special Assistant to the Attorney General.
Department of Justice,
Washington, D. C.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 10, 1939.

(Appearance of Miss Helen R. Carloss as Counsel for Respondent.)

The Clerk will enter our appearances as Counsel for the Respondent.

JAMES W. MORRIS,
Assistant Attorney General.

SEWALL KEY,
HELEN R. CARLOSS,
Special Assistants to the
Attorney General.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 22, 1939.

[fol. 40] (Appearance of Mr. Philip F. Biggins as Amicus Curiae.)

The Clerk will enter my appearance as Counsel for the Amicus Curiae.

PHILIP F. BIGGINS,
315 Evening Star Building,
Washington, D. C.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 17, 1939.

(Appearance of Mr. Thomas H. Remington and Mr. Albert S. Willey as Counsel for Amicus Curiae.)

The Clerk will enter my appearance as Counsel for the Amicus Curiae.

THOMAS H. REMINGTON,
ALBERT S. WILLEY,
1224 Lincoln Alliance Bank Bldg.,
Rochester, New York.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 20, 1939.

(Appearance of Mr. Claude W. Dudley and Mr. Davis Biggs, Jr., as Counsel for Amicus Curiae.)

The Clerk will enter my appearance as Counsel for the Amicus Curiae.

CLAUDE W. DUDLEY,
DAVIS BIGGS, JR.,
of Carter & Jones.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 22, 1939.

[fol. 41] (Order of Submission.)

May Term, 1939.

Monday, May 29, 1939.

This cause having been called for hearing in its regular order, argument was commenced by Mr. John E. Hughes for petitioner, continued by Miss Helen R. Carloss, Special Assistant to the Attorney General, for respondent, and concluded by Mr. John E. Hughes for petitioner.

Thereupon, this cause was submitted to the Court on the transcript of the record from said Board of Tax Appeals, the briefs of counsel for the respective parties and those filed by amici curiae.

[fol. 42] (Opinion.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 11,446.—MAY TERM, A. D. 1939.

Crane-Johnson Company, Petitioner,
vs.
Commissioner of Internal Revenue, Respondent.

On Petition to Review Decision of United States Board of Tax Appeals.

[August 3, 1939.]

Mr. John E. Hughes for Petitioner.

Miss Helen R. Carloss, Special Assistant to the Attorney General (Mr. Sewall Key, Special Assistant to the Attorney General, was with her on the brief) for Respondent.

Mr. Thomas H. Remington filed a brief as amicus curiae.

Mr. Philip F. Biggins filed a brief as amicus curiae.

Mr. Claude W. Dudley and Messrs. Carter & Jones filed a brief as amicus curiae.

Before GARDNER, SANBORN and WOODROUGH, Circuit Judges.

GARDNER, Circuit Judge, delivered the opinion of the court.

This is a petition to review a decision of the United States Board of Tax Appeals. The facts were stipulated and hence are not in dispute. Petitioner, a corporation, was organized under the laws of the State of North Dakota in 1903. As of January 1, 1936, it had a deficit of $21,251.40. The records, prior to January 1, 1929, do not show whether the deficit occurred from operating losses or capital distributions in excess of earnings, or other adjustments. No dividend distribution had been made by the petitioner since March, 1930, when $9,672.00 was distributed from its surplus balance. In its income tax return for the calendar year 1936, it claimed a credit under Section 26 (c) of the Revenue Act of 1936 against the imposition of surtax on undistributed profits under Section 14 (a), which the commissioner disallowed. The net income computed for 1936 was $13,450.76. The commissioner found a deficiency of $1,707.36 on an undistributed net income which he found to exist in the amount of $12,032.72. The Board of Tax Appeals having sustained this determination, the petitioner seeks a review of that decision.

It is the contention of the petitioner that it was not subject to the undistributed profits surtax because it did not have any surplus or undivided profits from which, under the laws of North Dakota, any dividends could lawfully have been paid or distributed.

Section 4543 of the North Dakota Compiled Laws of 1913 provides that:

"The directors of corporations must not make dividends except from the surplus profits arising from the business thereof; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, nor must they create debts beyond the subscribed capital stock * * *."

Section 4544 provides as a penalty for a violation of Section 4543 that the directors under whose administration a violation shall have occurred, except those who have caused their dissent therefrom to be entered at large on the minutes or were not present, shall in their individual and private capacity be jointly and severally liable to the corporation and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock so divided withdrawn, paid out, or reduced, or the debt contracted.

The Revenue Act of 1936 imposed a special surtax on that part of the profits of the corporation not distributed as dividends. Section 26 (c) allowed a credit against the income on which this tax was imposed in the event a corporation was expressly restricted from payment of dividends by "a written contract executed by the corporation prior to May 1, 1936." It is the contention of petitioner that the North Dakota law became a part of the contract between the corporation and the state, and hence, by the provisions of Section 26 (c) (1) of the Revenue Act of 1936, it was entitled to credit for dividends which could not be paid in violation of a written contract executed by the corporation, and that if the Revenue Act should be construed to tax the corporation because its directors refused to violate the state law, the Act violated the Fifth Amendment to the Constitution.

The Supreme Court of North Dakota has held that a dividend can not rightfully be declared by a corporation except out of the profits earned by it, and that this principle is embodied in the North Dakota statutes above referred to. *Ulness* v. *Dunnell* (N. D.) 237 N. W. 208. Similar statutory provisions were in existence when petitioner was incorporated.

The question for determination is whether, within the purview of Section 26 (c) (1) of the Revenue Act of 1936, petitioner's charter, including as it doubtless does the North Dakota statutes, constituted a "written contract executed by the corporation." For some purposes, the charter of a corporation may be said to be a contract with the state, and the laws, constitutional or statutory, of the state where the corporation is organized become a part

of its articles of incorporation, so that the charter of a corporation organized under general law consists of its articles of incorporation and the laws applicable thereto. Here, the articles of incorporation and such certificate as may have issued on the organization of the corporation contain no provision restricting dividend payments. It is necessary, therefore, to look to the statutes of North Dakota for the restriction, and to determine whether the state law of North Dakota is a written contract executed by the corporation.

As has been observed, Section 4543 of the North Dakota Compiled Laws contains a prohibition against improper declaration of dividends by directors, and Section 4544 penalizes such consenting directors by making them jointly and severally liable to the corporation and to the creditors in the event of dissolution, to the full amount of the capital stock reduced. These statutes, we think, do not establish a contract executed by the corporation expressly dealing with the payment of dividends. If there is such a contract, it is not an express one, but is implied. Under these statutes, the directors assume a liability as to creditors akin to that of suretyship, and the corporation may itself hold its directors liable for improper distribution of its assets. The obligation is that of the directors, and in the event of the improper exercise of their power to declare dividends, they, as distinguished from the corporation, may be held liable for the consequences of a violation of the statute. Under the North Dakota statutes the liability is statutory and is purely one between the directors and the creditors. The corporation itself has made no written contract affecting its right to declare dividends.

Section 26 (c) (1) of the Revenue Act of 1936, which is invoked, is a credit provision granting credits or exemptions. Such provisions in the tax laws are to be strictly construed. *Helvering* v. *Inter-Mountain Life Insurance Co.*, 294 U. S. 686; *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232; *United States Trust Co.* v. *Anderson* (CCA2) 65 Fed. (2d) 575.

We are here considering a tax law, and the question is not whether for any purpose a charter or a state law may be treated as a contract, but rather whether they together may be considered a written contract executed by the corporation within the meaning of Section 26 (c) (1) of the Revenue Act of 1936. Such contract as arises from the organization of a corporation under state laws is an implied rather than a voluntary written agreement entered

into by the corporation. Congress has the power to levy a tax on corporate net income even though there be an impairment of capital. *Willcuts* v. *Milton Dairy Co.*, 275 U. S. 215.

It is worthy of note that an analogous provision is found in Section 26 (c) (2) of the Revenue Act of 1936, which allows a credit of an amount equal to the portion of the earnings and profits of the taxable year which is required "by a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the disposition of earnings and profits of the taxable year to be paid within the taxable year in discharge of a debt, or to be irrevocably set aside within the taxable year for the discharge of a debt; to the extent that such amount has been paid or set aside." Clearly, this provision relates to a corporate undertaking to discharge a certain obligation out of earnings, and not to any statutory provisions. These similar provisions should be construed by the same rule.

Conceding the petitioner fully bound by the North Dakota statutes inhibiting the declaration of dividends, it does not follow that it is entitled to the exemption or credit which Congress saw fit to grant.

It is further urged that if construed to tax a corporation because it failed to do an unlawful and criminal act, the statute violates the Fifth Amendment. But no North Dakota statute has been called to our attention which makes it a crime to declare a dividend out of capital. Petitioner is urging the court to decide a question of constitutional law based upon a hypothetical set of facts, which is not permissible. *Tennessee Publishing Co.* v. *American Nat. Bank*, 299 U. S. 18; *Cincinnati* v. *Vester*, 281 U. S. 439; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337.

In the list of points to be argued in petitioner's brief appears the point that the Board should have granted the petition for rehearing. The matter is not referred to in the body of the brief and should probably be treated as abandoned. It is, however, referred to in certain briefs filed *amicus curiae*. On this point we think it sufficient to say that such a petition is addressed to the discretion of the Board, and in the absence of an abuse of discretion its ruling should not be disturbed. The basis for the petition was the fact that the petitioner was represented before the Board by a certified public accountant who was not a lawyer. It is strenuously urged that such a public accountant was engaged in the unauthorized practice of law. Rule 2 of the Rules of Prac-

tice and Procedure before the Board of Tax Appeals permits certified public accountants duly qualified under the laws of any state or territory or the District of Columbia to practice before the Board. This rule was promulgated under Section 907 (a) of the Revenue Act of 1924 as amended. Title 26 U. S. C. A. Sec. 611.

The statute gave the Board full authority to make rules governing the practice before it. *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117. Petitioner voluntarily made its choice of representative. After an adverse decision, petitioner argues that as only a question of law was presented, it was entitled to go before the Board through a lawyer. It was undoubtedly in the first instance entitled to be so represented had it so elected; but it is certainly not in position to complain that the Board did not compel it to be so represented. In the denial of petition for rehearing, we are of the opinion that there was no abuse of discretion. *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308. We are not here attempting to determine the question as to whether the appearance before the Board by a certified public accountant constituted the unlawful practice of law in the District of Columbia. We have no jurisdiction or power to determine that question, and in any event it would be improper to pass judgment upon such a question in the absence of notice to and an opportunity to be heard on the part of the certified public accountant who appeared for the petitioner. *In re Noell* (CCA8) 93 Fed. (2d) 5.

The decision of the Board of Tax Appeals is therefore

Affirmed.

[fol. 48]

(Decree.)

United States Circuit Court of Appeals,
Eighth Circuit.

May Term, 1939.

Tuesday, August 8, 1939.

Crane-Johnson Company, Petitioner,
No. 11,446. vs.
Commissioner of Internal Revenue.

On Petition to Review Decision of United States Board of Tax Appeals.

This cause came on to be heard on the petition to review a decision of the United States Board of Tax Ap-

peals redetermining a deficiency in the income tax of the petitioner for the year 1936, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the decision of the said Board of Tax Appeals in this cause, be, and the same is hereby, affirmed.

And it is further ordered by this Court that the petition to review herein, be, and the same is hereby, dismissed without the taxation of costs in favor of either of the parties in this Court.

August 8, 1939.

[fol. 49] (Petition For Rehearing and Motion For Leave to Amend Petition for Rehearing.)

Memorandum of Clerk:

And thereafter on September 1, 1939, petition for rehearing was filed by counsel for petitioner, within the provisions of an order of the Court extending time for filing petition for rehearing, and on September 2, 1939, motion of petitioner to amend petition for rehearing was filed, which matters are omitted pursuant to praecipe for transcript filed by counsel for petitioner.

(Order Denying Motion to Amend Petition For Rehearing and Petition for Rehearing.)

May Term, 1939.

Friday, September 15, 1939.

In this cause the petition for rehearing filed by counsel for petitioner and motion to amend said petition have been considered, and It is now here Ordered by this Court that the motion to amend and the petition for rehearing be, and they are each hereby, denied.

September 15, 1939.

[fol. 50] (Praecipe For Transcript For Supreme Court, U. S.)

Sir:

In preparing the record of proceedings in the Circuit Court of Appeals on Writ of Certiorari, please omit the Petition for Rehearing and the Motion to amend said Petition for Rehearing. Show that a Petition for Rehearing was filed and the date thereof and also the date it was denied and the order denying the same. Also omit all captions.

Except for the above omissions the record should be the usual record prepared by you for a Petition for the Writ of Certiorari.

JOHN E. HUGHES,
Attorney for Petitioner.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 26, 1939.

[fol. 51] (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the record on petition to review the decision of the United States Board of Tax Appeals as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the praecipe of counsel for petitioner, in a certain cause in said Circuit Court of Appeals wherein Crane-Johnson Company was Petitioner and the Commissioner of Internal Revenue was Respondent, No. 11,446, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the twenty-eighth day of September, A. D. 1939, a mandate was issued out of said Circuit Court of Appeals directed to the United States Board of Tax Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-seventh day of October, A. D. 1939.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—March 25, 1940

On petition for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

A motion for leave to file a petition for rehearing and petition for rehearing having been submitted in this case;

Upon consideration thereof, it is ordered by this Court that the motion for leave to file and petition for rehearing be, and the same are hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8674)